NO. 21655

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TOM PARKER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On September 29, 1965, the Federal Grand Jury for the Southern District of California returned a two-count indictment against the appellant charging him with forging and uttering a United States Treasury check [C. T. 2-3]. 1/

Pursuant to a plea of not guilty, trial by jury commenced on July 11, 1966 [C. T. 4]. The jury returned a verdict of guilty on both counts on July 12, 1966 [C. T. 5-6].

1/ "C. T." refers to Clerk's Transcript.

Count One charged:

On or about March 15, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant Tom Parker, knowingly and willfully forged on United States Treasury Check number 99, 355, 807, dated February 26, 1965, in the amount of $430. 60, the endorsement and signature of the payee, B. Carter, for the purpose of obtaining and receiving said amount from the United States, its officers and agents.

Count Two charged:

On or about March 15, 1965, in Los Angeles County, within the Central Division of the Southern District of California, defendant Tom Parker, with intent to defraud the United States, uttered and published as true United States Treasury Check number 99, 355, 807, dated February 26, 1965, in the amount of $430. 60, bearing the purported endorsement of the payee, B. Carter, which endorsement was forged, as the defendant then and there well knew.

On September 21, 1966, Judge Albert Lee Stephens committed appellant to the custody of the Attorney General for concurrent terms of three years on each count, on the condition that appellant is to be confined in a jail-type institution for a period of three months on each count, to begin and run concurrently; the execution of the remainder of the sentence was suspended and appellant was placed on probation for three years [C. T. 7].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231.

Jurisdiction of this Court is based upon Title 28, United

States Code, Sections 1291 and 1294.

II

STATUTES INVOLVED

Title 18, United States Code, Section 495, provides:

"Whoever falsely makes, alters, forges, or counterfeits any deed, power of attorney, order, certificate, receipt, contract, or other writing, for the purpose of obtaining or receiving, or of enabling any other person, either directly or indirectly, to obtain or receive from the United States or any officers or agents thereof, any sum of money; or

"Whoever utters or publishes as true any such false, forged, altered, or counterfeited writing, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited; or

"Whoever transmits to, or presents at any office or officer of the United States, any such writing in support of, or in relation to, any account or claim, with intent to defraud the United States, knowing the same to be false, altered, forged, or counterfeited --

"Shall be fined not more than $1,000 or imprisoned not more than ten years, or both."

III

QUESTIONS PRESENTED

1. Were appellant's Fifth Amendment rights violated by the admission into evidence of a voluntarily executed handwriting exemplar?
2. Was the evidence sufficient to support the verdict?

IV

STATEMENT OF FACTS

On March 15, 1965, appellant Tom Parker, presented a Government check to Judge Anderson, a clerk in the Memo Liquor Store, Compton, California [R. T. 18-19]. 2/ Parker occasionally visited the store, and Anderson recognized him. Anderson, however, did not know Parker well, and knew him only as "Tom" [R. T. 28]. Anderson initialed the check and presented it to witness Richard McCray for payment [R. T. 57], after Parker had endorsed and placed an address on the back of it [R. T. 26]. In exchange for the check, McCray issued three money orders to Parker, deducted the amount of a small purchase, and handed Parker some cash [R. T. 62]. Payment of the check in cash would have substantially reduced the store's fund of cash for change and cashing checks [R. T. 19]. Later, Parker returned and Anderson cashed one of

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2/ "R. T." refers to Reporter's Transcript.

the money orders [R. T. 22-24]; a second money order was also cashed at the Memo Liquor Store [R. T. 25, 48]; the record does not reveal where the third money order was negotiated.

A handwriting expert, Sgt. William Bowman, testified that in his opinion some of the handwritings on the check, two of the money orders, and the handwriting exemplar were written by the same person [R. T. 102-103].

It was stipulated that the payees of the check did not negotiate or endorse it, or authorize Parker to do so [R. T. 16-17]. The money orders were numbered consecutively, and all were issued by the Memo Liquor Store [R. T. 21-22, 58-61]. One money order was made payable to Tom Parker from Edna Parker, 111 Millet Street, Eunice, Louisiana. Edna Parker is Tom Parker's mother [R. T. 134]. Another money order bears the address of 722 Santa Rita Street, Compton, California, the address of Parker's girl friend [R. T. 134].

Parker testified that he had lost his wallet two months prior to March 15, 1965; that the wallet was lost in Palos Verdes Hills, California; and that identification cards, including his mother's name and address, were in the wallet [R. T. 133, 135-136].

When Parker was arrested by Secret Service Agent Frank Slocum, he was advised of his right to remain silent, that any statement made could be used against him in a court of law, and that an attorney would be contacted for him, if he desired [R. T. 91]. Parker was then taken before a United States Commissioner, where he was arraigned. As he waited to be arraigned by the Commissioner,

Parker voluntarily executed a handwriting exemplar, at the request of Agent Slocum [R. T. 91]. Slocum told Parker that the exemplar would be submitted to a handwriting expert, and Parker replied that the experts would find the writing on the check was not his [R. T. 91-92]. Parker testified that he filled out Exhibit No. 5 freely and voluntarily [R. T. 133].

V

ARGUMENT

A. A VOLUNTARILY SUBMITTED HANDWRITING EXEMPLAR IS NOT WITHIN THE FIFTH AMENDMENT PROSCRIPTION OF COMPULSORY SELF-INCRIMINATION.

The admission of Exhibit 5 (handwriting exemplar) into evidence, was not compulsory self-incrimination as to appellant. Appellant was neither compelled to make a statement, nor to execute the handwriting form. He steadfastly asserted his innocence at the time the form was executed, and testified that he wrote Exhibit 5 freely and voluntarily [R. T. 91-92, 133].

Appellant relies upon Miranda v. Arizona, 384 U. S. 201 (1966), Escobedo v. Illinois, 378 U. S. 478 (1963) and Massiah v. United States, 377 U. S. 201 (1963). In each of these cases the defendant was compelled to make incriminatory statements, which were admitted against him at trial. This case does not involve the admission of a statement made by the defendant. Moreover, Parker

was told by Agent Slocum that Exhibit 5 would be submitted to a handwriting expert, to which Parker responded by asserting his innocence and his confidence that the expert would exonerate him [R. T. 91-92]. Parker then freely executed the exhibit [R. T. 133]. Manifestly, Parker was aware of the purpose, nature, and importance of the handwriting exemplar; he knew he was free to refuse to execute it. On these facts, the above-cited cases are inapposite, since no compulsion is present.

In Schmerber v. California, 384 U. S. 757, 764 (1966), the Supreme Court indicated that the Fifth Amendment offers no protection against compulsion to write or speak for identification, since the privilege bars compelling "communication" or "testimony". Thus, even if defendant had been compelled to execute the exemplar, it is arguable that no constitutional right would have been violated. In any event, the handwriting exemplar was voluntarily given after defendant had been informed of his rights.

A voluntarily executed handwriting exemplar is not embraced by the Fifth Amendment privilege. This principle has been enunciated by several Circuit Courts of Appeal in carefully reasoned opinions.

In United States v. Acosta, 369 F. 2d 41 (4th Cir. 1966), a conviction of forging and uttering a Government savings bond was affirmed. Defendant had voluntarily furnished handwriting exemplars after he was warned that he need not do so. The Court held that since the exemplar was given voluntarily, it was admissible and that it need not, therefore, decide the question of whether

compelling a handwriting exemplar is a violation of his privilege of self-incrimination.

A similar holding was handed down by the Second Circuit Court of Appeals in United States v. Serao, 367 F. 2d 347 (2nd Cir. 1966). Introduction into evidence of a handwriting exemplar, procured from defendant after he had been arraigned on a gambling charge, did not violate defendant's Fifth Amendment privileges because the handwriting sample was used merely as a standard for identification and not to communicate information.

Finally, this Court has held that the privilege against self-incrimination is limited to incriminating communications. Gilbert v. United States, 366 F. 2d 923 (9th Cir. 1966), holds that compelling a defendant to appear at a line-up, where he is required to speak certain phrases in a loud and soft voice and walk in a certain manner, is not a violation of his Fifth Amendment rights. An exhaustive review of the authorities and the constitutional standards applicable to the privilege against self-incrimination is set forth at pages 935-937. In view of that discussion, further argument on this question is inappropriate and unnecessary.

B. THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

In considering the sufficiency of the evidence, an appellate court must view the evidence in the light most favorable to the Government, together with all reasonable inferences which may

be drawn from that evidence. Noto v. United States, 367 U.S. 290 (1961); Glasser v. United States, 315 U.S. 60 (1942). If the Court finds substantial evidence, it must presume the findings of the trier of fact to be correct and sustain the judgment. Noto v. United States, supra; Ingram v. United States, 360 U.S. 672, 678 (1959).

That the credibility of a witness is exclusively the province of the jury can no longer be challenged. Stoppelli v. United States, 183 F.2d 391 (9th Cir. 1950), cert. denied, 340 U.S. 864 (1950). Prior inconsistent statements, demeanor, assertions, and explanations of the witnesses were properly submitted to the jury for determination. Obviously, the jury chose to believe the Government witnesses. This Court will not substitute its judgment for that of the jury. Diaz-Rosendo v. United States, 357 F.2d 124 (9th Cir. 1966).

As pointed out in paragraph IV, defendant's denial of the offense and his explanation of the lost wallet was before the jury. Two Government witnesses positively identified him as the person who presented the check for encashment; another testified that Parker's handwriting was on the Government check. The names and addresses on the money orders were specially within Parker's knowledge, and the money orders, which were numbered sequentially, were issued by the Memo Liquor Store, where two of the Government witnesses clerked. These facts are ample to support the jury's verdict under the above-cited authorities.

Since this Court has indicated that it will not interfere with

the jury's determination of the witnesses' credibility, or its resolution of conflicts in evidence, United States v. Muns, 340 F. 2d 851 (9th Cir. 1965), cert. denied, 381 U. S. 913 (1965), Appellant cannot now relitigate the issues of fact decided at the trial.

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Craig B. Jorgensen

CRAIG B. JORGENSEN